

**BOARD OF APPEALS
for
MONTGOMERY COUNTY**

Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
240-777-6600

**Case No. CBA-2830-A
PETITION OF GRACIANO P. GANCAYCO**

OPINION OF THE BOARD

(Hearing held December 10, 2003)
(Effective Date of Opinion: March 16, 2004)

Case No. CBA-2830-A is a petition to modify an existing special exception for a medical practitioner's office for use of other than a resident of the building, to permit: (a) three practitioners to operate at the site, with no more than two practitioners operating at any given time, (b) the removal of Dr. R. A. Camargo and the addition of Dr. Robert Gancayco and Dr. Menkina Gancayco as practitioners permitted to operate at the site, and (c) a change in the hours of operation of the practice to Mondays, Tuesdays, Thursdays and Fridays from 9:00 a.m. to 5:00 p.m. and Wednesdays from 9:00 a.m. to 2:00 p.m.¹

The petition is filed pursuant to Section 59-G-1.3(c) of the Montgomery County Zoning Ordinance, codified as Chapter 59 of the Montgomery County Code (the "Zoning Ordinance"). The Board held a public hearing on the petition on December 10, 2003. The Petitioner was represented by Helen Primo, Esquire. Thomas P. Ross, Jr., Esquire, represented Joseph Clifford Hannah, who intervened. Martin Klauber, Esquire, as Peoples' Counsel, and Alec Lichtman, President of the Bel Manor Condominium Association, also intervened.

Decision of the Board: Special exception modification **denied**.

EVIDENCE PRESENTED TO THE BOARD

The Board finds by a preponderance of the evidence that:

1. The subject property, known as 3800 Bel Pre Road, Apartment 1 (the "Property"), is located in Silver Spring in the R-20 zoning district. The Property is

¹ During the course of the hearing, the Petitioner withdrew his request to modify the hours of operation of the special exception use.

a unit in one of the buildings of the Bel Pre Manor condominium regime. The entrance to the unit is at the rear of the building.

2. On June 30, 1970, the Board granted a special exception to permit the use of the Property as a non-resident medical practitioner's office. The Board's Opinion provides that patients may be seen on Mondays through Fridays from 9:00 a.m. to 6:00 p.m. and one-half day on Saturdays. Entrance to the office is to be directly from the parking lot. Four off-street parking spaces are to be provided for use by the petitioner's patients near the entrance to the office. The Board's approval was subject to the following two conditions:

“1. The petitioner, Dr. Graciano Gancayco, shall be the only doctor to practice in the subject apartment.

2. Four (4) parking spaces shall be allocated for the patients of the petitioner and the spaces shall be so designated.”

3. On February 23, 1977, the Board approved an amendment to the special exception to permit the Petitioner's associate, Dr. C. A. Camargo, to also work at the site and to extend the hours of operation on Thursdays to 8:00 p.m. The Board's Opinion imposes the following two conditions:

“1. The petitioner, Dr. Gancayco, and an associate, Dr. R. A. Camargo, shall be the only physicians permitted to practice in the subject apartment; only one physician shall practice in the subject premises at one time.

2. Four parking spaces shall be marked and reserved for use of patients of Drs. Gancayco and Camargo.”

4. On October 18, 2001, the Department of Permitting Services issued a Notice of Violation to the Petitioner citing violations of the conditions of the 1977 special exception approval. The notice states that Dr. Camargo no longer practices at the Property and that Drs. Robert and Menkina Gancayco practice with the Petitioner. The notice also states that only three parking spaces are marked for patients.

5. In December 2001, the Petitioner filed with the Board a petition for a minor modification of the special exception. By Resolution dated February 25, 2002, the Board determined that the requested modifications substantially change the nature, character and intensity of the use from the original grant of the special exception and may also affect traffic and the surrounding neighborhood. Pursuant to Section 59-G-1.3(c)(2), the Board ordered a public hearing to consider the modification request.

6. In March 2002, the Petitioner filed a petition for a major modification of the special exception indicating, among other things, that Dr. Camargo had left the Petitioner's practice. The petition requests that Dr. Robert Gancayco, the Petitioner's son, and his wife, Dr. Menkina Gancayco, be added to the practice and that two physicians be permitted at the location at one time. The Petitioner would be in the office on Wednesdays and Thursdays and Drs. Robert and Menkina Gancayco would be in the office on Mondays, Tuesdays and Fridays. The petition further indicates that a fourth patient parking space has been added since the issuance of the Violation Notice. The petition states that "the Condominium is unwilling to provide 4 additional spaces due to its requirement of a certain number of guest spaces." The Petitioner wrote that he intended to seek a waiver of four additional reserved spaces from the Department of Permitting Services ("DPS").

7. On September 4, 2002, the Maryland-National Capital Park and Planning Commission (the "M-NCPPC") issued a report (Exhibit 17) indicating, among other things, that the area in front of the Property contains about 50 parking spaces, with 26 spaces marked as reserved and 24 spaces marked as guest parking. Behind the building are 35 reserved parking spaces, 10 guest spaces and four with signposts marked for the medical practitioner. The Declaration of the Bel Pre Manor condominium (Attachment 10 to the M-NCPPC Report) provides that each unit is assigned one parking space, but that physicians and dentists "may" be allowed the exclusive use of one or more spaces for their patients' use during office hours. The M-NCPPC Report indicates that the Bel Pre Manor condominium association has not granted approval of more than four patient parking spaces for the Petitioner's practice. The Report recommends approval of the modification subject to, *inter alia*, a condition that the applicant must provide four additional marked parking spaces. The M-NCPPC Report states, "If the applicant and the condominium association management cannot reach an accord for additional marked parking spaces, the applicant should seek a parking waiver from the Board of Appeals."

8. On July 23, 2003, DPS approved a waiver of the off-street parking requirements for the Property (Exhibit 33). Specifically, DPS granted a waiver to that portion of Section 59-E-3.7 that requires no less than four parking spaces for each medical practitioner using an office. The waiver states that "the management of the condominium association has refused to reserve the required parking spaces necessary for the modification petition" and finds that there are sufficient parking spaces in the parking lot such that the required patient parking could be provided without impact on the residents' use of the lot.

FINDINGS OF THE BOARD

Based upon the testimony and the evidence of record, the Board concludes that the special exception modification must be denied. The requested modification does not comply with the general and specific

requirements for a medical practitioner's office for use of other than a resident of the building in the R-20 zone as set forth in Sections 59-G-1.2 and 2.36 of the Zoning Ordinance. Specifically, the Board finds that the petition fails to meet the following requirements:

Montgomery County Zoning Ordinance

Sec. 59-G-1.21. General conditions.

(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

...

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

The Board finds that the requested modification does not comply with Section 59-G-2.36(b)(5) (see discussion below).

Sec. 59-G-2.36. Medical practitioners' office for use of other than a resident of the building.

...

(b) In the R-H, R-10, R-20 and R-30 zones, one or more offices for one or more medical practitioners may be permitted provided, that:

...

(5) Off-street parking spaces shall be provided as required in article 59-E of this chapter which shall be in addition to those spaces required for the residential portion of the building and shall be specifically designated for the use of the patients of the medical practitioners.

The Board finds that the requested modification does not provide the off-street parking spaces required by this section. Article 59-E – specifically, Section 59-E-3.7 – provides, in pertinent part, that off-street parking space must be provided as follows:

“Office, medical practitioner's. Not less than 4 parking spaces for each practitioner occupying or using such office.”

Because the Petitioner proposes that two practitioners be allowed on the Property at any one time, the Petitioner must provide eight parking spaces that must be specifically designated for the use of patients.

The Petitioner concedes that his modification plan does not provide eight designated parking spaces. The Petitioner argues, however, that he is not required to provide eight designated parking spaces, but is required only to provide four designated parking spaces because DPS has waived the provision of Article 59-E that requires four additional spaces for the second practitioner. Alternatively, the Petitioner argues that the Board may waive the requirement that the additional parking spaces be “specifically designated for the use of the patients” and requests that we do so in light of the availability of ample guest parking spaces in the condominium parking lot. Thus, according to the Petitioner, his obligation to provide patient parking will be satisfied by the provision of four designated parking spaces and the demonstrated availability of non-designated guest parking spaces. We disagree with both of the Petitioner’s premises and explain.

With regard to the Petitioner’s first argument, we might be persuaded that the DPS waiver of the parking requirement of Section 59-E-37 also served to waive the parking requirement of Section 59-G-2.36(b)(5) if the latter provision simply read “*Off-street parking spaces shall be provided as required in article 59-E of this chapter.*” It does not. The legislature expressly included in the specific criteria for a non-resident medical practitioner special exception the added proviso that such patient parking spaces “*shall be in addition to those spaces required for the residential portion of the building and shall be specifically designated for the use of the patients of the medical practitioners.*” This language evinces a clear legislative intent that, where a special exception is concerned, patient parking spaces must not only be provided, they must be specifically designated and not part of the residential parking allocation. In waiving Section 59-E-3.7, DPS gave no consideration to these additional factors. If, as the Petitioner suggests, the DPS waiver also serves to waive Section 59-G-2.36(b)(5), then this second clause is rendered meaningless. If reasonably possible, a statute is to be read so that no word, phrase, clause, or sentence is rendered surplusage or meaningless. The Mayor and Council of Rockville, et al. v. Rylyns Enterprises, Inc., 372 Md. 514 (2003).

Moreover, if the statute is part of a general statutory scheme or system, the sections must be read together to ascertain the true intention of the Legislature. *Id.* It is manifest in the Zoning Ordinance that the legislature empowered the Board alone to approve special exceptions. Section 59-A-4.11. This is so because a special exception is a separate type of use that, while presumptively compatible with other uses in a zone, requires an administrative

body to determine under specified statutory standards whether the presumptive compatibility in fact exists. Creswell v. Baltimore Aviation Serv., Inc., 257 Md. 712, 719, 264 A.2d 838, 842 (1970). Nowhere in the law is the power to waive the specified statutory standards granted to DPS. The Petitioner's interpretation of the interplay of Sections 59-E-3.7 and 59-G-2.36(b)(5), however, would, indirectly but effectively, provide DPS with the power to waive a specific special exception criterion. We do not think the legislature intended such an absurd result.

We believe the more logical construction of these provisions is that a DPS waiver of Section 59-E-3.7 does not waive the parking requirement of Section 59-G-2.36(b)(5). Consequently, when a petitioner applies for a special exception (or a modification of a special exception) for a non-resident medical practitioner's office, the petitioner must provide the designated off-street parking required by Section 59-G-2.36(b)(5) regardless of any waiver granted by DPS. In this case, because the Petitioner's modification request fails to include eight specifically designated patient parking spaces, the request must be denied.

We also disagree with the Petitioner's alternative contention that the Board can waive the portion of Section 59-G-2.36(b)(5) that requires that patient parking spaces be specifically designated. There is nothing in Section 59-G-2.36, or elsewhere in the Zoning Ordinance, that suggests that we have this power. Indeed, where in other instances the legislature has determined that it is appropriate for the Board to waive or relax any specific statutory standard, it has expressly said so. See, e.g., Section 59-G-1.23(c) (authorizing the Board to waive the minimum frontage requirements for certain special exceptions); Section 59-G-2.00(b)(2) (authorizing the Board to waive the one year ownership requirement for accessory apartments); Section 59-G-2.21(c) (authorizing the Board to waive certain development standards for charitable or philanthropic institutions); Section 59-G-2.24(b)(3) (authorizing the Board to waive certain requirements for the location of accessory buildings for a golf course and country club); Section 59-G-2.29(j)(3) (authorizing the Board to waive side and rear yard parking requirements for a major home occupation). See also Section 59-A-6.4 (authorizing the Board to waive side and rear yard requirements for community emergency shelters); Section 59-A-4.21 (authorizing the Board to waive variance filing fees). Where the legislature in a statute expressly authorizes a particular action under certain circumstances, the statute ordinarily should be construed as not allowing the action under other circumstances. Mossburg v. Montgomery County, 329 Md. 494, 620 A.2d 886 (1993). See, e.g., In re Ryan S., 369 Md. 26, 797 A.2d 39 (2002); Office & Prof. Employees Int'l v. MTA, 295 Md. 88, 96, 453 A.2d 1191, 1195 (1982); Montgomery v. State, 292 Md. 155, 162-163, 438 A.2d 490, 493 (1981); In re Appeal No. 653, 277 Md. 212, 218, 352 A.2d 845, 849 (1976).

Expressio unius est exclusio alterius – the expression of one thing is the exclusion of another. There being no clear manifestation of intent to the contrary,

we find that the legislature acted intentionally and purposely when it expressly granted us the power to waive special exception requirements in certain instances, but did not do so with respect to off-street parking for non-resident medical practitioners' offices. Consequently, we do not have the authority to waive any portion of Section 59-G-2.36(b)(5).

Therefore, based upon the foregoing, the Board **denies** the Petition for Modification of the Existing Special Exception for a Medical Practitioner's Office for Use of Other Than a Resident of the Building.

Member Louise L. Mayer was necessarily absent and did not participate in this Resolution. On a motion by Member Allison Ishihara Fultz, seconded by Vice-Chair Donna L. Barron, and Member Angelo M. Caputo and Chairman Donald H. Spence in agreement, the Board voted 4 to 0 to deny the petition and adopt the following Resolution:

BE IT RESOLVED by the Board of Appeals for Montgomery County, Maryland that the opinion stated above be adopted as the Resolution required by law as its decision on the above entitled petition.

Donald H. Spence, Jr.
Chairman, Montgomery County Board of Appeals

Entered in the Opinion Book
of the Board of Appeals for
Montgomery County, Maryland
this 16th day of March, 2004.

Katherine Freeman
Executive Secretary to the Board

NOTE:

Any request for rehearing or reconsideration must be filed within fifteen (15) days after the date the Opinion is mailed and entered in the Opinion Book (see Section 59-A-4.63 of the Zoning Ordinance). Please see the Board's Rules of Procedure for specific instructions for requesting reconsideration.

Any decision by the County Board of Appeals may, within thirty (30) days after the decision is rendered, be appealed by any person aggrieved by the decision of the Board and a party to the proceeding before it, to the Circuit Court for Montgomery County on accordance with the Maryland Rules of Procedure.